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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR MORAN ANGULO,

Defendant and Appellant.

D074717

(Super. Ct. No. FSB1202478-1)

APPEAL from a judgment of the Superior Court of San Bernardino County,
William Jefferson Powell IV, Judge. Reversed and remanded.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, and Alana
Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

Victor Moran Angulo appeals from the judgment following his conviction by a jury of second degree murder. Angulo's primary defensive theory at trial was that he shot the victim in self-defense, while the victim was physically threatening him and attempting to commit a robbery. The People concede the trial court had no legal basis to instruct the jury that "[i]mperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force." Considering the facts and proceedings in this case, we conclude the erroneous instruction had a reasonable likelihood of affecting the jury's verdict. Moreover, during closing argument the prosecutor misstated the law regarding whether Angulo could be a victim of a robbery, contributing to the prejudicial nature of the instructional error. Accordingly, we reverse the judgment and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

Angulo was charged with murdering Angel Cortez. Angulo pleaded not guilty and was tried by jury.

At trial, the prosecution and Angulo relied on the same key witnesses—his girlfriend, Olga Varela, and his house mate, Jeramy Toutai. Varela and Toutai witnessed the events leading up to the shooting, the shooting itself, and subsequent events. Angulo also made statements to law enforcement officers after the shooting, evidence of which was admitted at trial.

The evidence showed as follows: Angulo lived in a home with Varela, Toutai, and several other people. Cortez, the victim, was distantly related to Angulo. Cortez was also a methamphetamine user and gang member. He had visited Angulo's home on a few

occasions prior to the shooting, largely without incident, but on at least one prior visit had demanded money from residents of the home and/or taken property that did not belong to him. Angulo and Cortez were involved in a fraudulent credit card scheme together, through which they both made money.

On the day of the shooting, Cortez came to Angulo's home and demanded money from Angulo in a hostile manner. At the time of Cortez's visit, at least Varela, Toutai, Toutai's girlfriend, two other residents of the home, and two other men associated with Angulo (Michael and Chino), were also in the home. Angulo and Cortez argued off and on for about 30 minutes; at one point, Cortez slapped Angulo in the face. Both Toutai and Varela tried to intervene and deescalate the situation to no avail.

A few people in the home held an impromptu meeting and decided that Cortez must leave the house; one resident informed him that he had 10 minutes to go. Cortez did not leave; instead, he picked up a pair of long garden shears, which were kept in the house for landscaping purposes, and held them in his hands. Right before the shooting, Cortez lunged at Angulo with the shears. The men were standing by a sliding door that led to the backyard. Angulo stepped out to the backyard and within moments, returned with a gun, which he pointed at Cortez. As soon as Cortez saw the gun, he turned and ran toward the front door of the house. Angulo followed and fired one shot at the back of Cortez's head, instantly killing him.

Most of the people in the home, including Angulo, Varela, and Toutai, quickly left the premises. Michael remained, moved the dead body out of sight, and cleaned the front door area with bleach. Angulo returned to the home. Over the next week, Cortez's death

went unnoticed by the outside world and unreported. Angulo assisted in concealing and burning Cortez's decomposing body in a hole in the backyard. After receiving a report of a foul odor, police officers discovered the body in the hole. They arrested Angulo, who first denied having any involvement in the shooting and ultimately admitted shooting Cortez but claimed self-defense.

The jury acquitted Angulo of first degree murder, but convicted him of the lesser included offense of second degree murder (Pen. Code, §§ 187, subd. (a), 189)¹ and also made a true finding on a firearm enhancement (§ 12022.53, subd. (d)). The court sentenced him to state prison for 40 years to life. This appeal followed.

DISCUSSION

I. *Instructional Error on Imperfect Self-Defense*

Angulo asked the court to instruct the jury on imperfect self-defense. Imperfect self-defense is the actual, but unreasonable, belief in the need to protect oneself from imminent peril. (*In re Christian S.* (1994) 7 Cal.4th 768, 773; *People v. Barton* (1995) 12 Cal.4th 186, 201-202.) When imperfect self-defense applies, it reduces a homicide from murder to voluntary manslaughter because the killing lacks malice aforethought. (*People v. Blakeley* (2000) 23 Cal.4th 82, 87-88; *Barton*, at pp. 200-201.) "The subjective elements of self-defense and imperfect self-defense are identical. Under each theory, the [defendant] must actually believe in the need to defend himself against imminent peril to life or great bodily injury." (*People v. Viramontes* (2001)

¹ All further statutory references are to the Penal Code unless otherwise specified.

93 Cal.App.4th 1256, 1262.) The difference between the two theories turns on the reasonableness of the defendant's belief. (*Ibid.*)

Included in the imperfect self-defense instruction (CALCRIM No. 571) given to the jury in this case was the following language: "Imperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force." Defense counsel objected, arguing that Angulo had done nothing to justify Cortez's use of force against him and that merely committing a crime (e.g., credit card fraud) did not justify Cortez's attack.

The trial court provided several reasons for overruling defense counsel's objection. It indicated there was a factual dispute concerning whether Cortez threatened Angulo with the shears since "[the shears] were never found." Further, the court stated that "the defendant was . . . voluntarily involving himself in criminality within an area controlled by a well-known gang" and that the jury "need[ed] to know what to do with those facts [involving Angulo's criminality]." The prosecutor also reminded the court that Angulo was "involved in illegal conduct with the victim" and the "victim came to the defendant asking about proceeds or demanding proceeds," which were more specific circumstances why the instruction was needed. The court agreed.

The trial court and prosecutor misunderstood the law. Imperfect self-defense may not be invoked when a defendant "through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is *legally* justified For example, the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing

police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense." (*People v. Randle* (2005) 35 Cal.4th 987, 1001 (*Randle*), italics added, overruled on another ground by *People v. Chun* (2009) 45 Cal.4th 1172.) In contrast, the defense *may* be invoked "when the victim's use of force against the defendant is unlawful, even when the defendant set in motion the chain of events that led the victim to attack the defendant." (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180 (*Vasquez*) [imperfect self-defense available where defendant initially confronted victim with an accusation, the victim began to choke the defendant, and the defendant pulled out a gun and shot the victim].)

In this case, even if Angulo in some way "set in motion the chain of events" that led his adversary to lunge at him with garden shears, imperfect self-defense remained available to him as a defense. Cortez's use of force was not lawful or legally justified. (*Randle, supra*, 35 Cal.4th at pp. 1002-1003 [victim's "taking the law into this own hands" and attacking defendant was unjustified].) On appeal, the People concede the challenged instruction should not have been given to the jury and the trial court's reasoning for providing it was flawed. However, the People claim the error was harmless under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Randle*, at pp. 1003-1004 [instructional error on imperfect self-defense reviewed for prejudice under *Watson* test].)

We conclude the error was not harmless. Based on the trial evidence and prosecutor's arguments, the jury could have reasonably found that Angulo had agreed to share proceeds with Cortez in a criminal enterprise and that, on the day he was killed,

Cortez was in the home to collect his share of the proceeds. Following this logic, the jury may have reasonably found that Angulo had, through his own wrongful conduct, created circumstances which justified Cortez's use of force and negated Angulo's ability to claim imperfect self-defense. We have no doubt the prosecutor intended for the challenged instruction to be used by the jury in such a fashion, as she stated on the record.

The People argue the jury most likely disregarded the improper instruction as inapplicable and/or the jury did not have to consider it because the key disputed issues were whether Angulo had an actual belief in imminent danger and whether he used more force than necessary to defend himself.

We do not agree the jury probably disregarded the erroneous instruction. Angulo's primary defensive theory at trial was self-defense, which is closely related to imperfect self-defense. The prosecutor emphasized that Angulo and Cortez were engaged in "illegal things" together, they were both robbers, and that Angulo could not be a victim of robbery by Cortez.² This line of argument supported a use (or misuse) of the improper instruction, i.e., that Angulo essentially created the need for Cortez to use force against him. Notably, the improper instruction was not limited to *legal* or *lawful* uses of force.

Furthermore, as in *Vasquez*, the "murder charge against [Angulo] was not airtight." (*Vasquez, supra*, 136 Cal.App.4th at p. 1180.) The jury deliberations spanned three days for a relatively straightforward one-count case where there was no question that Angulo was the shooter. The jury repeatedly asked for multiple copies of the jury

² On this point that Angulo could not be a victim of robbery, the prosecutor misstated the law. See Discussion, pt. II.A., *post*.

instructions "so that ea[ch] juror [could] review them," and it re-watched video testimony. The jury acquitted Angulo of first degree murder, meaning it found he was not sitting in his home with a willful, deliberate, or premeditated plan to kill his relative. Instead, it convicted him of the lesser included offense of second degree murder. The jury's verdict implies it found Angulo formed his intent to kill only under the immediate circumstance of being confronted by Cortez, which is consistent with second degree murder but is equally consistent with voluntary manslaughter arising from imperfect self-defense. Because the evidence could have allowed a jury to conclude that Angulo actually, but unreasonably, believed his life was in imminent peril and that deadly force was necessary to defend himself against Cortez, the murder conviction cannot stand. The case is remanded for retrial.

II. *Other Conceded Matters*

The People concede several other issues, which we briefly discuss to prevent recurrence of the errors on remand.

A. *Prosecutorial Misstatement of Law*

In contending that Angulo did not kill Cortez in self-defense or in defense of his home, the prosecutor argued that Angulo could not have been robbed by Cortez. For example, she stated in pertinent part:

"[Cortez] just wanted his cut from the illegal enterprise that they were committing. It isn't even their money to begin with, right? The money they were making didn't even belong to them to begin with. [[¶]] . . . [¶] But [in] this case, is [Cortez] really robbing the defendant, robbing him of money that doesn't even belong with him to begin with? That is not a robbery."

Defense counsel interposed an objection to the prosecutor's argument as a "misstatement of the law." The court overruled counsel's objection and remarked, "I think it was a fairly concise statement of the issues we talked about earlier about the personal property issues." The obvious implication from the court's comment in front of the jury was that the prosecutor had correctly stated the law. In closing rebuttal argument, the prosecutor repeated that Angulo could not have been robbed by Cortez:

"There are six elements to robbery and the last element of that says when you take the property you are intending to deprive the owner of it. Neither [Angulo nor Cortez] owned that property. Neither of them owned that money. It belonged to other victims. It's not a robbery."

The People rightly concede on appeal that the prosecutor misstated the law. "As a rule, robbery may be committed against a person who is not the owner of property—indeed, it may be committed against a thief." (*People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143.) "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211; *People v. Covarrubias* (2016) 1 Cal.5th 838, 875-876.) It was not necessary for Angulo to "own" the money from a criminal enterprise for Cortez to attempt to rob him. The ultimate question for the jury to decide was whether it was reasonable for Angulo to believe he needed to defend himself from someone intending to

or trying to commit a robbery in his home.³ (CALCRIM No. 506 [defense of habitation instruction].)

Given our disposition of the case, we need not determine whether the prosecutor's misstatement of law was independently prejudicial. As we have discussed, the prosecutor's misstatement of law contributed to the prejudicial nature of the instructional error on imperfect self-defense.

B. *Instructional Issue on Accomplice Principles as to Toutai*

The jury was instructed that "before [it] may consider the statement or testimony of . . . Jeramy Toutai as evidence against . . . Angulo," it had to decide whether Toutai was an accomplice to the crime, and, if the jury decided he was an accomplice, his testimony must be corroborated. (CALCRIM No. 334.)

Section 1111 "defines an accomplice as 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' 'To be so chargeable, the witness must be a principal under section 31. That section defines principals as "[a]ll persons concerned in the commission of a crime, whether . . . they directly commit the act constituting the offense, or aid and abet in its commission" (§ 31.) An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense. Like a conspirator, an aider and

³ The prosecutor was free to argue that Cortez was not trying to commit a robbery based on the evidence at trial, but she could not imply that Angulo's "ownership" of the property was a legal requirement for him to be robbed.

abettor is guilty not only of the offense he intended to encourage or facilitate, but also of any reasonably foreseeable offense committed by the perpetrator he aids and abets.' "

(*People v. Richardson* (2008) 43 Cal.4th 959, 1023.)

A trial court must instruct the jury, sua sponte, to determine whether a witness was an accomplice when there is sufficient evidence for a jury to conclude that a witness implicating a defendant was an accomplice. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.)

On appeal, the People implicitly concede there was insufficient evidence for the jury to find that Toutai was Angulo's accomplice, which appears correct on this record.⁴ We trust that, in any retrial, the trial court will reconsider the propriety of giving accomplice-related instructions.⁵

C. *Firearm Enhancement* (§ 12022.53, subd. (h))

When Angulo was sentenced, the law at the time did not permit the trial court to strike or dismiss his firearm enhancement. Subsequently, on January 1, 2018, Senate Bill

⁴ We do not see how the challenged instruction was prejudicial to Angulo, however, since it potentially required corroboration for Toutai's statements only when statements were used as evidence *against* Angulo; there was no corroboration requirement for statements that supported Angulo. As worded, the instruction was harmless. (See *People v. Guiuan* (1998) 18 Cal.4th 558, 566-567 [explaining different treatment of accomplices who testify for the prosecution, defendant, or both].)

⁵ Angulo raises several other instructional issues on appeal, which we need not address in light of our disposition. For example, he argues the court failed to sua sponte instruct the jury on manslaughter based on a sudden quarrel or heat of passion and that instructions were needed on the claim-of-right doctrine and home protection bill of rights. Because the facts that may be developed at any retrial may differ from those before us, disputed fact-specific issues are better left to the trial court in the first instance. (*Vasquez, supra*, 136 Cal.App.4th at p. 1180, fn. 4.)

No. 620 went into effect and added section 12022.53, subdivision (h), which grants the sentencing court discretion to strike or dismiss a firearm enhancement in the interest of justice. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 506.) The current law will apply to Angulo on any resentencing.

DISPOSITION

The judgment is reversed and remanded for a new trial consistent with the views expressed in this opinion.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.